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No. 87-391

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CHASER SHIPPING CORPORATION AND DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (THE NORWEGIAN WAR RISK INSURANCE FOR SHIPS, A MUTUAL ASSOCIATION), PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, invoking the political question doctrine, properly dismissed petitioners' suit against the United States to recover for damage caused to a foreign vessel by a mine that allegedly was placed in a harbor in Nicaragua under the supervision of the Central Intelligence Agency.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 3a-6a) is unreported. The opinion of the district court (Pet. App. 7a-24a) is reported at 649 F. Supp. 736.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1987, and the petition for rehearing was denied on June 11, 1987 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Chaser Shipping, a Liberian corporation, is the owner of the vessel *M/T IVER CHASER*, which was damaged when it allegedly came into contact with a mine

in the harbor of Corinto, Nicaragua, on March 28, 1984. Petitioner Den Norske Krigsforsikring for Skib, Gjensidig Forening (The Norwegian War Risk Insurance for Ships, a Mutual Association) was the war-risk insurer of the vessel. Den Norske paid petitioner Chaser approximately $1.6 million for the damage to the vessel and is subrogated to that extent to the rights and claims of Chaser. Pet. 2-3; Pet. App. 8a-9a.

Petitioners filed this action in the United States District Court for the Southern District of New York under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, and the Suits in Admiralty Act (SAA), 46 U.S.C. 742, seeking to recover from the United States for the damage sustained by the *M/T IVER CHASER*. Petitioners alleged that the Central Intelligence Agency (CIA), with the approval of the President, manufactured the mines, supervised and directed their placement in the harbor, and carried out those acts in a negligent or malicious manner. The United States moved to dismiss the complaint on three grounds: (i) that the suit is barred by the political question doctrine; (ii) that the suit cannot in any event be maintained under the FTCA or the SAA because, inter alia, of the discretionary function exception to the FTCA (28 U.S.C. 2680(a)) and parallel principles under the SAA; and (iii) that venue did not lie in the Southern District of New York. Pet. App. 9a-10a.

The district court dismissed the complaint, holding that the suit is barred by the political question doctrine (Pet. App. 7a-24a). The court noted that in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), this Court had identified a number of concerns that trigger application of the political question doctrine (Pet. App. 12a-13a). The court further noted that several of those concerns, any one of which would render the suit non-justiciable, are present in this case (*id.* at 13a).

The district court concluded, for example, that the concern for the " 'potentiality of embarrassment from multifarious pronouncements by various departments on one question' " is "seriously implicated in this case" (Pet. App. 13a, 21a (quoting 369 U.S. at 217)). Thus, the court observed that "the White House, the CIA and the State Department all publicly denied that the [United States] Government was directly involved in the mining," and that it "could indeed be embarrassing to the Government" if a judicial inquiry called those prior declarations by Executive officials into question (Pet. App. 21a). The court also concluded that this suit would in any event interfere with the conduct of the Nation's foreign relations, which "the Constitution commits to the Executive Branch" (Pet. App. 14a), and that it therefore implicates the Court's concern in *Baker* v. *Carr* regarding judicial involvement where there is " 'a textually demonstrable constitutional commitment of the issue to a coordinate political department' " (Pet. App. 14a, 12a (quoting 369 U.S. at 217)).

In the court's view, it was irrelevant that petitioners did not seek to enjoin the actions of the President and the CIA, but rather sought damages under a theory of tort liability. Even under a tort theory, the court reasoned, there is " 'a lack of judicially discoverable and manageable standards' " for resolving petitioners' claim (Pet. App. 12a-13a, 16a (quoting 369 U.S. at 217)). The court found it significant in this regard that the suit was brought by "two foreign entities seeking damages for injuries suffered in foreign waters due to covert mining operations conducted there by the Executive Branch" (Pet. App. 16a), and that petitioners' theory of liability rests on prior instances in which the United States warned third parties about the possible commencement of military operations which petitioners contend gave rise to an "enforceable duty to adhere to such practice" (*id.* at 16a-17a). The court also found it "apparent that inquiries concerning such alleged breaches could not be conducted without obtaining

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classified intelligence documents relating to the covert operations," yet those documents would be "clearly exempt from disclosure" because they contain "secret national defense or foreign policy information" (*id.* at 17a). Finally, the court explained that "[e]ven if petitioners were accorded access to intelligence documents concerning the mining of the harbor at Corinto, the Court would be incapable of assessing the underlying military and diplomatic considerations which resulted in the decision to place the mines without warning to innocent third party vessels" (*id.* at 18a). See also *id.* at 19a-21a.

2. The court of appeals affirmed in an unpublished order (Pet. App. 3a-6a). The court of appeals rejected the contention that this suit is justiciable because petitioners do not challenge the policy decision to mine the harbors of Nicaragua, only the allegedly negligent execution of that policy. The court reasoned that the basis of petitioners' negligence claim—the CIA's alleged decision to take covert rather than overt action—"was itself a policy decision and as such may not be judicially reviewed in the lawsuit [petitioners] have brought" (*id.* at 5a).

ARGUMENT

The courts below correctly concluded that this suit is barred by the political question doctrine. The court of appeals' brief unpublished order of affirmance does not conflict with any decision of this Court or of another court of appeals and presents no question warranting review by this Court. The petition for a writ of certiorari therefore should be denied.

1. As an initial matter, we note that petitioners' theory for holding the United States liable for the damage to the *IVER CHASER* is extremely attenuated. Petitioners expressly do *not* challenge the alleged decision by the President or the CIA to place mines in the harbors of Nicaragua.

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See Pet. 26, 37.[1] For present purposes, then, it must be assumed that any decision by the United States to assist or participate in the alleged mining was entirely lawful and does not give rise to liability on the part of the United States.

The theory of petitioners' claim instead is that the United States had a duty to warn third party vessels of the presence of the mines. In petitioners' view, that duty arose both as a matter of international law and because the United States made an official public announcement in advance of its quarantine of Cuba in 1962 and its mining of North Vietnamese harbors in 1972. See Pet. 9-13, 26-29, 34-38. The difficulty with this contention is that, as petitioners concede (Pet. 5-6, 8-9, 28-29), the mining of harbors in Nicaragua in fact *was* publicly revealed prior to March 28, 1984, when the *IVER CHASER* was struck. According to the very news reports and other materials upon which petitioners rely, the following events occurred and were publicly reported prior to March 28, 1984: (i) on March 1 and 7, while the *IVER CHASER* was en route to Corinto, two other ships were damaged as a result of contact with mines outside the harbor of Corinto (see Pet. 8); (ii) on March 21, 1984, the Soviet Union attributed responsibility for the mining to the United States and protested to the United States concerning damage caused to a Soviet vessel while entering Puerto Sandino on March 20, 1984 (see Pet. 8-9, citing N.Y. Times, Mar. 22, 1984, at A1, col.3); and (iii) the insurgency forces (the "Contras") had announced, apparently as early as January 1984, that they had placed mines in Nicaraguan harbors (see Pet. 5-6, 28-29).[2]

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[1] Although for present purposes the United States accepts as true the allegations in the complaint, the district court correctly observed that the United States Government has never officially acknowledged its participation, or lack thereof, in the mining. See Pet. App. 10a-11a.

[2] In the March 22, 1984 article in the New York Times cited by petitioners (Pet. 9), the State Department denied United States involvement in the mining but stated that the anti-Sandinista forces previous-

Petitioners acknowledge that the mining was announced by the insurgents, but they nevertheless maintain (Pet. 29) that these announcements were inadequate because they might have been dismissed by shipowners as "wishful thinking." According to petitioners, only an official announcement of the mining by the United States would have sufficed. Thus, the theory of petitioners' suit is that the United States should be held responsible because the shipowner failed to take seriously the announcements that petitioners concede were issued by the insurgency forces.[3] But this theory fails to take account of the incidents involving ships near Corinto on March 1 and 7, before the IVER CHASER arrived; those incidents obviously should have removed any doubts petitioners and others might have had concerning the accuracy of the insurgents' announcements. Moreover, the Casualty Report supplied by the ship's crew (PX 3) states that prior to casting off, the ship was inspected by military divers in order "to ensure there were no mines attached to the ship's hull." Obviously, then, the crew was aware of the danger. In short, petitioners' effort to hold the United States liable for damage to the IVER CHASER resulting from mining is highly tenuous.

2. In any event, the court of appeals correctly affirmed the district court's dismissal of this suit under the political question doctrine. That doctrine rests on the

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ly had announced the mining of harbors in Nicaragua. N.Y. Times, Mar. 22, 1984, at A4, cols. 1-3. On the same date, the Nicaraguan Government announced its intention to obtain minesweepers to clear its harbors of explosive devices. See *id.* at col. 3.

[3] Petitioners rely (Pet. 6) on an affidavit filed in the International Court of Justice in the case of *Nicaragua* v. *United States,* 25 I.L.M. 1023 (1986), which states that the announcement by the insurgency forces concerning the mining was issued pursuant to CIA instructions. Assuming for present purposes that this is accurate, it only undermines petitioners' contention that the United States took no steps to warn third parties of the existence of the mines.

separation of powers under the Constitution (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803); *Baker* v. *Carr*, 369 U.S. at 217) and specifically upon "the relationship between the judiciary and the coordinate branches of the Federal Government" (*Baker* v. *Carr*, 369 U.S. at 210). The various circumstances in which the political question doctrine requires dismissal of a suit were summarized by this Court in *Baker* v. *Carr*, 369 U.S. at 217:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

As the district court held (Pet. App. 13a), a number of these factors are present in this case.

As regards the conduct of foreign policy and national security affairs, there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department" (*Baker* v. *Carr*, 369 U.S. at 217). Under Article II, Section 2 of the Constitution, the President is the Commander in Chief of the Army and Navy, and since the adoption of the Constitution he has been recognized as " 'the sole organ of the nation in its external relations, and its sole representative with foreign nations." ' *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 Annals of Cong. 613

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(1800) (remarks of John Marshall)). The commitment of such matters to the President is confirmed by the National Security Act of 1947, 50 U.S.C. 403 *et seq.*, which vests the Executive Branch, including the CIA, with broad authority in matters relating to both foreign intelligence and national security operations. See *CIA* v. *Sims*, 471 U.S. 159, 167, 168-169, 170-173 (1985); *Snepp* v. *United States*, 444 U.S. 507 (1980). Accordingly, matters intimately related to foreign policy and national security are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952) (footnote omitted); see also *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948). They therefore "are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). In this case, an adjudication of petitioners' claim would go to the heart of the formulation, execution, and continuation of an asserted operation that, according to petitioners' own allegations, was approved at the highest levels in the Executive Branch.

There is, moreover, a "lack of judicially discoverable and manageable standards for resolving [petitioners claim]" (*Baker* v. *Carr,* 369 U.S. at 217). See Pet. App. 16a-17a. No satisfactory standard of reasonableness, due care, or duty to warn under principles of tort could be fashioned for a court to review the conduct of an alleged covert insurgency action in the waters off Central America. It would be necessary for the court to determine whether the President or the CIA pursued appropriate policy objectives in designing and carrying out the operation, whether reasonable alternatives were available, and whether the Nation's policy objectives required either the presence of the mines or the alleged involvement by the United States in their placement to remain confidential (or

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at least unconfirmed by the United States itself).[4] And as the district court further recognized, a manageable standard clearly could not be fashioned without obtaining access to sensitive foreign policy and intelligence information in the possession of the Executive Branch. Yet any such information is manifestly privileged from disclosure. *Id.* at 17a.[5] For similar reasons, judicial inquiry into these matters would "express[] lack of the respect due coordinate branches of government" and risk the "potentiality of embarrassment from multifarious pronouncements by various departments on one question" (*Baker* v. *Carr,* 369

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[4] In contending that judicially manageable standards could be developed, petitioners rely (Pet. 30-32) solely on cases in which routine accidents and ordinary negligence in the domestic operation of military equipment gave rise to potential liability on the part of the United States. None of the cases cited by petitioners involves alleged covert operations in a foreign country, such as that at issue here.

[5] In contending that the privileged nature of essential information should not be a bar to suit, petitioners rely (Pet. 33) on *Ramirez de Arellano* v. *Weinberger,* 745 F.2d 1500, 1513 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), dismissed as moot, 788 F.2d 762 (D.C. Cir. 1986). However, as the subsequent history of the case makes clear, the District of Columbia Circuit's entire discussion of the political question doctrine, including that pertaining to classified information, is no longer binding authority even in the District of Columbia Circuit, because the judgment of the court of appeals was vacated by this Court. Furthermore, in *Ramirez,* the fact of some United States involvement with the training center in Honduras already had been confirmed—and much information concerning that involvement already was a matter of public record—as a result of official pronouncements by the United States Government. See, *e.g.,* Foreign Assistance and Related Programs Appropriations Act, 1985, Pub. L. No. 98-473, 98 Stat. 1893-1894, cited in 471 U.S. at 1113. Similarly, in *Langenegger* v. *United States,* 756 F.2d 1565, 1569 (Fed. Cir.), cert. denied, 474 U.S. 824 (1985), upon which petitioners also rely (Pet. 33-34), the court of appeals concluded that much of the evidence that would be necessary to adjudicate the claim of a taking by the United States in El Salvador already was available from nonsecret sources. Here, by contrast, petitioners would be required

U.S. at 217), because the Executive Branch has officially denied direct involvement by the United States in the mining activities.[6]

Petitioners cannot avoid the political question doctrine by casting their challenge as one based on an alleged violation of a duty to warn, rather than a challenge to the mining itself. The court of appeals correctly rejected that contention, observing that "the decision to take covert rather than overt action was itself a policy decision and as such may not be judicially reviewed in the lawsuit [petitioners] have brought" (Pet. App. 5a). As the cases upon which they rely establish (see Pet. 19-21), the political question doctrine bars judicial inquiry when, as here, the "plaintiffs attack[] the rationale behind United States foreign policy determinations" (Pet. 19). See also *In re Korean Air Lines Disaster of Sept. 1, 1983,* 597 F. Supp. 613, 616-617 (D.D.C. 1984) (barring suit based on alleged failure by the United States to warn an aircraft that it had departed from its course over waters adjacent to the Soviet Union); Pet. App. 15a.[7]

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to seek, through the disclosure of documents by the Executive Branch, an official confirmation of the very fact of the involvement by the United States Government that they allege but that the United States officially denies. It therefore is evident that confidential information is at the core of this case.

[6] The potential for embarrassment from multifarious pronouncements is illustrated by petitioners' reliance (Pet. 6, 26) on the decision of the International Court of Justice in the action brought by Nicaragua against the United States based in part on alleged involvement by the United States in the mining activities. *Nicaragua* v. *United States,* 25 I.L.M. 1023 (1986). The United States, through the Executive Branch, contested that court's jurisdiction over the subject matter and withdrew from the proceedings after the court ruled that it would exercise jurisdiction. See Dept. of State Bull. #2096 (Mar. 1985), at p. 64. Petitioners thus seek to have the courts of the United States adjudicate a controversy that, in the view of the United States, was not properly subject to adjudication by the International Court of Justice.

[7] *Ramirez* and *Langenegger* (discussed at note 5, *supra*), upon which petitioners principally rely (Pet. 22-25, 27, 33, 35) in arguing

3. For the foregoing reasons, the district court correctly dismissed the complaint under the political question doctrine. In any event, the court of appeals' unpublished order affirming that dismissal does not conflict with the decisions of other courts, and it presents no issue warranting review by this Court.[8]

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that the political question doctrine is inapplicable here, were suits brought by United States citizens to recover just compensation from the United States for the alleged taking of their property. Here, by contrast, the suit is brought by foreign corporations, not United States citizens. Moreover, it does not seek to enforce rights conferred by the United States Constitution, but rather seeks to hold the United States liable in tort for actions taken in the implementation of the Nation's foreign policy. Such a suit goes to the very core of the responsibility of the Executive Branch for the conduct of the Nation's foreign affairs and national security.

Petitioners' reliance (Supp. Br. 1-7) on *Amerada Hess Shipping Corp.* v. *Argentine Republic,* No. 86-7602 (2d Cir. Sept. 11, 1987), is also misplaced. *Amerada Hess* is a suit against a *foreign* government, not the United States, and it concerns the scope of a district court's jurisdiction under the Alien Tort Statute, 28 U.S.C. 1350, and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, statutes that are not at issue in this case.

[8] Even if the political question doctrine were inapplicable, petitioners' suit under the FTCA would be barred by the discretionary function exception, 28 U.S.C. 2680(a), since the manner in which the alleged mining activities of the United States were carried out (including the decision whether to announce or otherwise confirm any involvement by the United States) is clearly committed to Executive discretion. Compare *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense,* 467 U.S. 797, 807-814 (1984). The SAA also has been construed by some courts to bar recovery based on the performance of discretionary activities. See, *e.g., Bearce* v. *United States,* 614 F.2d 556 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Gercey* v. *United States,* 540 F.2d 536 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); but see *De Bardeleben Marine Corp.* v. *United States,* 451 F.2d 140, 149 (5th Cir. 1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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